APPENDIX A — OPINION AND JUDGMENT

UNITED STATES of America, Plaintiff-Appellee,

v.

Frank AMATO, Samuel Salvatore Brunello, Donald Lambert, aka Louis Lamberti, Defendants-Appellants.

No. 73-2069.

United States Court of Appeals, F ifth Circuit.

Appeals from the United States District for the Southern District of Florida.

Before BROWN, Chief Judge, and TUTTLE and SIMPSON, Circuit Judges.

TUTTLE, Circuit Judge:

Defendants-appellants, Amato, Lambert, and Brunello, were convicted by a jury under the Hobbs Act, 18 U.S.C.A. § 1951[1] for conspiring to obstruct interstate commerce by extortion achieved by physical violence and threats of violence. On appeal appellants allege numerous errors by the

1. This provision provides:
"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
"(b) As used in this section—
"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

district court. However, we find meritorious only the claim of insufficiency of evidence.[2]

Appellants were indicted with five other co-defendants. The indictment charged a conspiracy continuing over a period of one year, November 1, 1970 through November 1, 1971, to extort money, goods, and services from Sheldon, Frederick, and Selma Arthur and a family corporation, "Oliver's," which was a restaurant and cocktail lounge. The government alleged that the evidence demonstrated that the defendants first induced fear in the Arthurs by threatened and actual violence, and then attempted to obtain money and employment for themselves and others at Oliver's. While unsuccessful, the government argues that the defendants did obtain food, drink, and services without payment. Three of the eight co-defendants were granted judgments of acquittal by the district court. Two were found innocent by the jury. Appellants, Amato, Lambert, and Brunello, were found guilty.

The Hobbs Act applies to one who ". . . affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspire so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section . . . ."[3] Appellants assert, individually, that there was insufficient proof on the elements necessary for conviction, specifically: (1) Failure to show an effect on interstate commerce; (2) Failure to prove formation of a conspiracy; (3) Failure to demonstrate each appellant's

2. Among other errors urged were: (a) Denial of a fair trial by the conduct and hysterics of two prosecution witnesses; (b) Denial of motions for severance; (c) Admission of declarations by co-conspirators contrary to United States v. Puco, 476 F.2d 1099 (2d Cir. 1973), cert. denied, 414 U.S. 844, 94 S.Ct. 1067, 38 L.Ed.2d 82 (1973); (d) The jury instructions on intent; (e) Denial of cross-examination; (f) Designation of an improper time period for the conspiracy in the indictment; and (g) Discriminatory selection of grand and petit juries.

3. *See* the text of the Hobbs Act, 18 U.S.C.A. § 1951, quoted in note 1, *supra*.

intent to join the conspiracy; (4) Failure to prove a reasonable fear on the part of the victims.

INTERSTATE COMMERCE

The essence of appellants' interstate commerce argument is that the government's proof only discloses *intrastate* sales by wholesale liquor and meat suppliers, who purchased their goods from out-of-state, to Oliver's. Appellants contend that the flow of the interstate goods stopped with the supplier, therefore, the interruption eliminates the interstate nature and effect of any intrastate sale between Oliver's and the supplier's. Secondarily, appellants state that there is no evidence that the flow of goods to the supplier ceased or slowed down, affecting commerce, as a result of the conspiracy.[4]

[1, 2] This Court described the manner in which the interstate commerce requirement of the Hobbs Act had to be satisfied in United States v. Nakaladski, 481 F.2d 289, 298–299 (5th Cir. 1973):

> ". . . Under the Hobbs Act it is not necessary that the subject of the extortion constitute interstate commerce, or that the purpose of the extortion be to affect interstate commerce. All that is required is that trade be affected by extortion 'in any way or degree,' Carbo v. United States, 9 Cir. 1963, 314 F.2d 718, 732; *see* United States v. Addonizio, *supra*, 451 F.2d [49] at 77, and that the victim have been induced to part with property through the use of fear." *Id.* at 298.

It is clear that:

> "The impact of extortion need affect interstate commerce only in a minimal degree, United States v. Hyde, 5 Cir., 1971, 448 F.2d 815, cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745." United States v. Nadaline, 471 F.2d 340, 343 (5th Cir. 1973).

4. *See* note 5, *infra*.

At trial the government called two witnesses who testified that their employers, one a liquor, the other a meat supplier, purchased their products from out-of-state sources. The government then offered documentary proof, i. e. invoices, that Oliver's purchased liquor and meat products from these suppliers. Finally, the government demonstrated that Oliver's was closed for a month because of the action and coercion of the conspirators.[5] From these facts, the court and the jury could reasonably infer an effect on interstate commerce.

The intermediate stop of the goods shipped interstate with the middle man supplier before receipt by Oliver's, does not make the effect on interstate commerce too attenuated. United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967); Battaglia v. United States, 383 F.2d 303, 305 (9th Cir. 1967). Likewise, the evidence of the closing of Oliver's as a consequence of the conspiracy furnishes sufficient inferences of the reduction of sales from suppliers who purchased out-of-state products. United States v. DeMasi, 445 F.2d 251, 257 (2d Cir. 1971);[6] United States v. Pranno, *supra,* 385 F.2d at 389.

5. One factor causing the closing of Oliver's was the destruction of the furnishings and the beating inflicted upon Frederick Arthur by defendant Peter Allan and two unidentified men on September 28, 1971. However, defendant Allan was granted an acquittal by the court because of the government's failure to comply with the Jencks Act. Because of the acquittal, there might be some question of the competence of this evidence to support a conclusion of an effect on interstate commerce if it were the sole cause of the closing of Oliver's. However, the evidence revealing that Sheldon Arthur felt compelled to ask Lambert and Amato for permission to reopen Oliver's was sufficient for the jury to infer that other factors, in addition to defendant Peter Allan's actions, forced the closing of Oliver's.

6. In *DeMasi,* the court stated:
"With reference to the argument that the Government failed to prove an effect on interstate commerce, we note only that the Club purchased its meat in Connecticut and its liquor both nationally and internationally, and that when the Club closed these deliveries were stopped. The requisite effect was proven." *Id.*

APPELLANT BRUNELLO

While inadequate proof of the effect on interstate commerce would have invalidated all convictions, the alleged insufficiency of proof on the other elements of the conspiracy charge have had to be examined individually, as to each appellant. Having carefully reviewed the record we reverse the conviction of appellant Brunello, and affirm the convictions of appellants Amato and Lambert.

[3] Brunello moved for a judgment of acquittal at several points within the trial and at the close of evidence. In addition, he filed a motion notwithstanding the verdict pursuant to Fed.R.Crim.P. 29(c). The district court denied these motions. This Court has stated most recently in United States v. Jeffords, 491 F.2d 90 (5th Cir. 1974):

> "The test in a criminal case to determine whether there is sufficient evidence to submit the case to the jury is:
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> > "On a motion for judgment of acquittal, the test is whether, taking the view most favorable to the Government, a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. Sanders v. United States, 5 Cir., 1969, 416 F.2d 194, 196; Jones v. United States, 5 Cir., 1968, 391 F.2d 273, 274; Weaver v. United States, 5 Cir., 1967, 374 F.2d 878, 881.
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> "United States v. Warner, 5 Cir. 1971, 441 F.2d 821, 825, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). *See also* Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941); United States v. Stephenson, 5 Cir., 1973, 474 F.2d 1353." *Id.* at 91.

The government's case against Brunello is grounded on his involvement with one of the other appellants, Amato, and the Arthurs in two incidents occurring on *one* night, May 28, during the one year conspiracy. The first incident was Brunello's participation in an altercation at Oliver's. He was accompanying appellant Amato, who began the fight. Al-

though the testimony is conflicting on whether Brunello was aggressively aiding Amato or attempting to separate the participants and terminate the fracas, we must take the view most favorable to the government—that Brunello was an active aggressor. During the scuffle, Selma Arthur testified that Brunello warned her that if the police were called that next time both her sons would be killed. For that reason she later testified that she told the police that Brunello was not one of the perpetrators of the altercation. Later that evening, Selma Arthur followed Amato and Brunello to the Gold Doubloon, a neighboring cocktail lounge, to plead that no further injuries be inflicted on her sons. Sheldon Arthur then appeared. He had an automatic hand gun in the waist band of his trousers. Brunello yoked Sheldon around the neck, grabbed the pistol from him, and threatened him. At the request of Amato, Brunello then gave the pistol to Selma Arthur, and the Arthurs left.

[4–7] No formal agreement is necessary to establish a conspiracy, whose existence often is proved by inferences from the actions of the actors or circumstantial evidence of a scheme. United States v. Nadaline, *supra*, 471 F.2d at 344; United States v. Anderson, 352 F.2d 500 (6th Cir. 1965). The question arises, however, whether this single night's involvement is sufficient to prove Brunello's *intent* to join, or *knowledge* of, the conspiracy. The proof on conspiracy charges, in general, requires:[7]

7. *See* Roberts v. United States, 416 F.2d 1216, 1221 (5th Cir. 1969) ("In sum, we are left with an abiding conviction that the jury's verdict of guilty as to Bookout is based upon suspicion and surmise only. She associated with the wrong people and was convicted because of guilt by association only."); Wood v. United States, 283 F.2d 4, 6 (5th Cir. 1960) ("This record demonstrates that these appellants spent much of their time during the period of the alleged conspiracy in company with proven bootleggers. This fact, coupled with their game of 'cops and robbers' in and around the area in which several stills were later found creates a strong suspicion that they had more than a passing interest in the stills and their product. Mere suspicion is, of course, not sufficient to warrant the submission of a criminal case to a jury.").

"In order to establish a person as a participant in a conspiracy, the evidence must show that the accused intended to join and cooperate in the illegal venture. Knowledge that a conspiracy exists is a minimum requirement for establishing the requisite intent. 'Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal.' Direct Sales Co. v. United States, 319 U.S. 703, 711, 63 S.Ct. 1265, 1269, 87 L.Ed. 1674. *See* Daily v. United States, 9 Cir., 282 F.2d 818, 821–822. Association with an alleged co-conspirator may raise a strong suspicion of knowledge and intent, but this is not the only reasonable inference which may be drawn from such conduct." Miller v. United States, 382 F.2d 583, 587 (9th Cir. 1967).

[8] Selma Arthur testified that she had never seen Brunello before or after May 28th. There was no other evidence even portraying Brunello as an associate or close companion of the other conspirators. Both Selma and Fred Arthur testified that Brunello had never solicited free liquor or food, or sought credit, money or employment. In fact, the government has not shown that Brunello had any interest at all in the outcome of the conspiracy. United States v. Noah, 475 F.2d 688, 697 (9th Cir. 1973). Although any violence perpetrated by Brunello cannot be condoned and is reprehensible, the record is devoid of any element of intent to join in an extortion conspiracy in violation of the Hobbs Act. *See* United States v. Nedley, 255 F.2d 350, 357–358 (3rd Cir. 1958). In sum, we find that as a matter of law the evidence against Brunello on the issue of intent to join, or even knowledge of, the conspiracy was insufficient to submit the case to the jury.

The Judgments of Conviction of Amato and Lambert are affirmed.

The Judgment of Conviction and sentence of Brunello is reversed and the case is remanded to the trial court for the entry of a Judgment of Acquittal as to him.

IN THE
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FOR THE FIFTH CIRCUIT

JUDGMENT
No. 73-2069

United States of America,

v.

AMATO, Et al.

On consideration whereof, it is now Ordered and Adjudged by this Court that the judgment of the said District Court be affirmed . . . .

Dated: June 7, 1974

APPENDIX B
ORDER ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

600 Camp Street
New Orleans, La. 70130

July 12, 1974

TO ALL COUNSEL OF RECORD

Re: 73-2069 U.S.A. v. AMATO, ET AL

Gentlemen:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
CLERK
By s/ Anne G. Parent
Deputy Clerk

APPENDIX C

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession

of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.